

BARLOW ROBBINS LLP  
Solicitors



Child Protection Issues Seminar 2011

16 February 2011

# Delegate List

Child Protection Issues Seminar 2011

16 February 2011

Name	Organisation
Karen Todd	ACS International Schools
Elaine Melton	ACS International Schools Limited
Charlie Freer	ACS International Schools Limited
Ram Gossain	ACS International Schools Limited
Norman Patterson	Aldro School Educational Trust Limited
Steve Meredith	Alliotts Chartered Accountants
Julia Card	Benenden School
Helen Wisher	Blackheath Nursery & Preparatory School
Sarah Phipps	Blackheath Nursery & Preparatory School
Tracy Ridge	Caterham School
Johanna Field	Caterham School
Phil Sharp	Christ's Hospital
Frances Innes	Christ's Hospital
Luchie Cawood	Eaton House Group of Schools
Sarah Bills	Eaton House Group of Schools
Shirley Blackburn	Emanuel School
Denise Regan	Epsom College
Tania Botting	Greenfield School
Claire Bourne	Hawkesdown House School
Jessica Morelle	Highgate School
Jennifer Paul	Hornsby House Educational Trust
Alison Siddiqui	Hornsby House Educational Trust
Anne Dobell	Kew College
Alan Wright	Micklefield School (Reigate) Limited
Ashley Casson	Old Vicarage School
Ruth Wilkinson	Old Vicarage School
Kevin McDonagh	Pennthorpe School
Paul Barlow	Royal Russell School
Janet Whelton	Royal Russell School
Jan Hand	Shrewsbury House School
Sara Frisby	St Catherine's School
Carol Robinson	St John's School
Stephanie Wicks	St Paul's School
Graham Paulson	St Teresas School
Katharine Crouch	Sutton High School
Victoria Foley	The Link Day Schools Ltd
Christine Armstrong	The Link Day Schools Ltd

# Programme

Child Protection Issues Seminar 2011

16 February 2011

9.30am

**Registration and Coffee**

10.00am

**Welcome and Introduction**

10.10am

**Child Protection Issues**

10.55am

**Brief Update on other Key Developments**

11.10am

**Panel Q&A Session**

11.30am

**Tea and Coffee**

A close-up photograph of a camera lens, showing the front element and the textured barrel. The background is a soft, out-of-focus bokeh of blue and purple light spots. The word "Focus" is overlaid in the center in a white, sans-serif font.

# Focus

# Presentation

# Child Protection Issues - Employment Law Implications

Joanna Lada-Walicki  
Barlow Robbins LLP

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## Programme

- What is:
  - Child protection?
  - Child abuse?
  - 'Every Child Matters'?
- Legal obligations of the school
- Signs of abuse/what to do
- Safer recruitment procedures
- Dealing with allegations against a member of staff
- Referral to the ISA

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## What is child protection and child abuse?

- Child protection - process of protecting children identified as suffering or at risk of suffering significant harm as a result of abuse or neglect
- Child abuse:
  - **Physical** - poking, pushing, hitting, throwing, poisoning, burning, drowning and suffocating (includes fabricated induced illness)
  - **Emotional** - persistent emotional ill treatment that is likely to cause serious harm to the child's emotional development e.g. name calling, telling children they are worthless, inadequate etc.
  - **Sexual** - forcing or enticing children to take part in sexual activities - includes involving children in watching pornographic activities
  - **Neglect** - persistent or severe neglect to meet a child's basic physical or psychological needs which is likely to result in serious impairment of their health and development
- Also, **organised abuse** - sexual abuse where there is more than one abuser and/or where an adult uses an institutional framework or position of authority to recruit children for sexual abuse i.e. grooming.

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## What is 'Every child matters'

- Launched by DfES - shared programme of change designed to improve outcomes for children and young people
- The aim is for every child to have support they need to:
  - Be healthy
  - Stay safe
  - Enjoy and achieve through learning
  - Make a positive contribution to society
  - Achieve economic wellbeing
- Schools are expected to work with other groups providing services to children to protect children from harm and help them achieve what they want
- Local Safeguarding Children Boards established in every LA

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## Legal obligations of the School

- Schools are under a statutory duty to make arrangements to safeguard and promote the welfare of children (e.g. Children Act 1989, Education Act 2002, The Education (Independent Schools Standards) (England) Regulations 2003 and The Education (Independent Schools Standards) (England) (Amendment) Regulations 2007 and Children Act 2004)
- Safeguarding Children and Safer Recruitment in Education Guidance January 2007 - independent schools (**through their governing body or proprietor**) must ensure that:
  - The school has a child protection policy and procedures in accordance with locally agreed inter-agency procedures (and policy available to parents on request)

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## Safeguarding Children and Safer Recruitment in Education

- The school operates safer recruitment procedures and ensures appropriate checks are carried out on staff and volunteers who work with children
- The school has procedures for dealing with allegations of abuse against members of staff or volunteers that comply with locally agreed inter-agency procedures; this includes procedures for the proprietor/nominated child protection governor to liaise with other agencies in the event of allegations against the Head
- A senior member of the school's management structure is designated to take lead responsibility for dealing with child protection issues - child protection officer (CPO) - and liaising with other agencies as necessary. A deputy should also be designated if the CPO is absent

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## Safeguarding Children and Safer Recruitment in Education (2)

- CPO should undertake basic child protection training and training in inter-agency working to standards set by the LSCB and refresher training at 2 yearly intervals
- The Head, and all other staff who work with children should undergo appropriate child protection training with refresher training at 3 yearly intervals
- Any deficiencies or weaknesses in relation to child protection arrangements should be remedied without delay and
- The school's policies and procedures should be reviewed annually and consideration given to how these duties have been discharged

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## Safeguarding Children and Safer Recruitment in Education (3)

- Heads should:
  - Ensure that the policies and procedures relating to child protection are implemented and followed by all staff
  - Make sure that sufficient resources and time are designated to enable the CPO and other staff to discharge their responsibilities including carrying out assessments of children
  - Liaise with the nominated governor/proprietor on child protection issues
  - Appoint a CPO to co-ordinate action within the school and liaise with other agencies in suspected abuse cases and ensure CPO has adequate training

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## Legal obligations

- Ensure that all staff know and are alert to signs of abuse and know what to do if they have any concerns
- Make parents aware of the school's child protection policy
- School must comply with The Education (Independent Schools Standards) (England) (Amendment) Regulations 2007
  - The Regulations require:
    - Written anti-bullying policy
    - Child protection policy that complies with requirements i.e. operate safe recruitment procedures, names one or more designated persons i.e. CPOs (and provides training for them)
    - Provide policy to parents on request
    - Annual review of policy by governors or proprietor

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## Signs of abuse / what to do

- Staff should be alert to signs of abuse e.g.
  - bruising, cuts or burns
  - changes in behaviour (such as quietness or withdrawal)
  - Lack of attachment to parents or other family members
  - Aggressive behaviour especially to friends
  - Weight loss that is not linked to illness
  - Sexually explicit behaviour or activity inappropriate to the child's age
  - Having strange secrets and telling lots of lies or untruths
  - Eating problems including over eating or loss of appetite
- Be alert also to inappropriate behaviour by another member of staff

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## Disclosure by a child to member of staff

- Listen - accept what the child is saying
- Don't interrogate the child
- Be calm and reassuring towards the child
- Do not promise confidentiality - tell them you will have to tell someone else
- Tell them what will happen next
- Make notes, recording dates and times – give this information to the CPO
- Do not delay
- Should it later be shown that the member of staff's actions were unnecessary he will still be justified in taking action if based on genuine concern for the child

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## Bullying behaviour

- School staff should be alert to signs of bullying:
  - Physical
  - Verbal
  - Emotional
  - Cyber
- Child protection policy may need to operate in conjunction with anti-bullying policy
- School's approach to combat bullying should be pre-emptive
- Staff should recognise that to allow or condone bullying may lead to action under the school's child protection policy - staff should not assume it is someone else's responsibility

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## Safer recruitment procedures

- Follow the Safeguarding Children and Safer Recruitment Guidance
  - Recruitment and selection policy statement incorporating an explicit statement about the school's commitment to safeguarding and promoting the welfare of children to be included in advertisements, person specification, job description, information pack and induction training
  - Application form to make clear successful applicant will be required to provide enhanced CRB disclosure
  - One member of recruitment panel must be trained in safer recruitment

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## Safer recruitment procedures (2)

- If applicant is currently working with children or has worked with children make clear the relevant employer will be asked about any disciplinary offences relating to children
- Offer of employment should be conditional on pre-employment checks (and see Safeguarding Vulnerable Groups Act 2006) including the ISA Barred Lists, enhanced CRB checks and verifying references
- Maintain a safer culture - i.e. continued awareness of safeguarding issues through induction and regular training

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## Dealing with suspected abuse by a member of staff

- Allegations indicating that a person is unsuitable to work with children
- Report to CPO at school
- CPO to inform Local Authority Designated Officer (LADO) if alleged behaviour:
  - Harmed child, or may have
  - Is a possible criminal offence
  - Towards child/ren indicates unsuitable to work with children
- Consultation between LADO and CPO
  - If allegation may constitute criminal offence LADO will refer to police

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## Dealing with suspected abuse by a member of staff (2)

- If child suffering or at risk of suffering significant harm - LADO will refer to LA children's social care
- Parents or carers should be informed if they do not already know; they should be kept informed of progress of the case and told outcome of disciplinary action but not detail of deliberations i.e. consider duties under Data Protection Act 1998 and confidentiality
- The school should ensure that confidentiality is maintained by all parties involved; staff involved should be reminded of their duty of confidentiality

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## Dealing with suspected abuse by a member of staff (3)

- If a police investigation is ongoing the LADO and the police will consider with the Head whether any disciplinary action should await completion of the police enquiries and/or prosecution
- The school may not want to wait - depending on the facts, the school may still decide to carry out its own investigation - but the employee may stay silent in order not to incriminate himself in criminal proceedings
- School should act promptly (subject to the above) fairly and consistently in a way that safeguards the child and also supports the person who is subject to the allegation

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## Dealing with suspected abuse by a member of staff (4)

- The school should inform the accused employee ASAP after consulting the LADO - however, where police or other agencies become involved the school should wait until agreement is reached as to what information may be disclosed
- If the employee belongs to a professional association or union he should be advised to contact the association
- The school must follow a fair procedure - check disciplinary procedure which should be compliant with the Acas Code of Practice on Disciplinary and Grievance Procedures (6 April 2009)
- The school must carry out an investigation:
  - Consider whether suspension is appropriate - evaluate risk of harm to children posed by the accused employee - is there an alternative?

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## Dealing with suspected abuse by a member of staff (5)

- Decide who will carry out investigation - Head or someone else?
- Gather relevant facts
- Obtain any witness statements early
- If case to answer arrange disciplinary hearing
- Give adequate notice of disciplinary hearing
- Set out clearly the nature of the complaint and purpose of the hearing - if dismissal is a possibility state this
- Provide copies of witness statements - may anonymity of witnesses be preserved? - and provide copies of any other evidence (subject to obtaining consent if appropriate)
- Police may in some cases share with the school for disciplinary purposes evidence they have obtained

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## Disciplinary hearing

- Set out who will hear the matter:
  - Headmaster or Bursar alone?
  - Disciplinary Panel (DP) of Governors?
- Refer to right to be accompanied - right to legal representation?  
Should be considered if employee may be dismissed and barred from working in his profession following a referral to the ISA e.g. teacher
- Ensure investigating officer does not hear the matter nor any governor with prior involvement

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## Disciplinary hearing (2)

- Investigating officer should prepare bundle of all relevant documents including witness statements and provide a copy to the employee and to Head/Bursar or DP
- Investigating officer should report on his investigation
- Employee and Head/DP entitled to question investigating officer and witnesses (in most cases)
- Right of employee to state his case and answer allegations - but remember employee may remain silent in order not to prejudice criminal proceedings - consider impact of this
- Explain role of companion (but consider legal representation if employee may be barred from working in his profession)

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## Disciplinary hearing (3)

- When is it appropriate to adjourn hearing?
- The decision: retire to consider and take legal advice
- N.B. An employee's refusal to take part in disciplinary process because of pending criminal proceedings does not mean dismissal before the outcome of criminal proceedings will necessarily be unfair - decision to dismiss must be within the band of reasonable responses taking all the circumstances into account
- Consider also the reputation of the school but balance this with impact on the employee

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## The decision

- Communicate decision within a reasonable time in writing
- Set out any action to be taken/sanction to be imposed
- If warning is given set out currency of warning
- If decision is to dismiss set out reasons and when the employment will terminate
  - Is dismissal reasonable? Must be within the band of reasonable responses
- Consider reputation of the school
- Set out right to appeal against decision

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## The Appeal

- Appeal Panel will comprise Governor(s) with no prior involvement
- Consider Appeal even if notice of Appeal sent out of time
- Write to employee in relation to the date and time of the hearing and refer to right to be accompanied - legal representation?
- Request grounds of appeal
- New evidence may be considered
- Communicate Appeal decision in writing

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## Common Procedural Failings

- Flawed/inadequate investigation
- Failure to give employee sufficient information or sufficient time prior to the hearing
- Decisions taken or influenced by persons other than those who have considered what the employee has to say
- Appeals being heard by persons with a prior involvement in the matter

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## When to make a referral to the ISA

- If the allegation is substantiated and the employee is dismissed for gross misconduct the Head should discuss with the LADO whether a referral should be made; consider also if employee resigns and/or if compromise agreement entered into - duty to refer overrides terms of agreement
- A referral must be made when an employer
  - Withdraws permission for an individual to engage in a regulated or controlled activity (e.g. teaching, cleaning, catering) or would have done so had the individual not resigned because the employer believes the individual has:
    - Engaged in 'relevant conduct' i.e.
      - Conduct which endangers a child or vulnerable adult or is likely to do so;

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## When to make a referral to the ISA (2)

- That involves sexual material relating to children including possession of such material; or
- That involves sexually explicit images depicting violence against human beings including possession of such images; or
- Of a sexual nature involving a child or vulnerable adult; or
- Satisfied the **Harm Test** i.e. if it is believed the person **may**
  - Harm a child or vulnerable adult; or
  - Cause a child or vulnerable adult to be harmed; or
  - Put a child or vulnerable adult at risk of harm; or
  - Attempt to harm a child or vulnerable adult; or
  - Incite another to harm a child or vulnerable adult; or

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## When to make a referral to the ISA (3)

- Received a caution or conviction for a **relevant offence** i.e. An offence set out in the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 and the Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) Regulations (Northern Ireland) 2009
- If a referral is appropriate it should be made within one month of the termination of employment

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## A brief update on other relevant areas of employment law

David Ludlow  
Barlow Robbins LLP

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## A Rush of Retirements?

- Statutory retirement procedure repealed from 6 April 2011 - Just 10 weeks away!
- DRA as a potentially fair reason to dismiss will be abolished from 1 October 2011
- ACAS guidance - "Working without the DRA"
- If Employer complies with statutory procedure to compulsorily retire the reason for dismissal will be deemed to be retirement.

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## Statutory procedure

- Give notice (not more than 12 months or less than 6 months) before Intended Retirement Date
- Employee has right to request to continue working
- Employer must hold meeting to discuss request (unless agreed)
- Employer informs employee of decision
- Employee has right to appeal
- Appeal hearing
- Notification of outcome

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## Transitional arrangements

- No new notifications of retirement using DRA on or after 6 April 2011 including short notice notifications.
- Only retirements before 1 October 2011 where full minimum notice given (6 months) will benefit from deeming provisions.
  - notice served on or before 30 March 2011
  - intended date of retirement must be on or before 30 September 2011
  - the employee is 65 on the intended date of retirement.
- Statutory retirement procedure must still be followed - duty to consider request in good faith not as a "done deal"? (*Ayodele -v- Compass Group*)

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## School Retirements Based on DRA

- If a retirement is to take effect on 31 August 2011 notification must be given by 28 February 2011 (latest) and contractual notice must be observed if longer.
- Payment in lieu of (unexpired) notice on or before 31 August 2011 provided notification is given
- Follow statutory retirement procedure

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## What are your options after 1 October 2011?

- Stop using retirement ages
- Set an Employer Justified Retirement Age in order to compulsory retire **BUT** must be justified as proportionate means of achieving a legitimate aim

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## Proportionate means of achieving a legitimate aim?

Proportionate means - No more than necessary to achieve legitimate aims - alternatives considered - fitness test instead of EJRA?

### Legitimate aim?

- Workforce planning
- Facilitating the recruitment and retention of younger employees
- Protecting the dignity of older employees by not requiring them to undergo performance management  
*(Seldon -v- Clarkson Wright & Jakes)*  
*(Hampton -v- Lord Chancellor)*
- Costs of extending employment - benefits  
*(Cross -v- BA) - "costs plus"*  
*(LB Tower Hamlets -v- Wooster)*  
*(Woodcock -v- Cumbria PCT) - cost only*
- Group risk insured benefits exemption

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## Practical Steps

- Proactive use of (non-contractual) capability procedures - be aware of disability discrimination and duty to make reasonable adjustments
- Ensure appraisal and capability processes are up to date, relevant for **all** staff and applied consistently to avoid claims of age discrimination
- Discuss retirement plans - be careful!
  - Without prejudice? *(BNP Paribas -v- Mezzotero)*

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## Other Developments in Employment Law

- Continuity of employment  
(*Hussain -v- Acorn Independent College*)
  - Summer breaks do not break continuity
- The right of accompaniment in disciplinary proceedings
  - A right to legal representation?
- The legal challenge to the automatic barring procedure
  - *R (on the application of Royal College of Nursing) and Ors -v- SoS for the Home Department*

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## Employment Law Reforms

- Employment Tribunal Reform
  - Increase in unfair dismissal qualifying period
  - Compulsory conciliation
  - Claimant's fees
- The Employers' Charter
  - Window dressing?

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## Panel Question and Answer Session

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A large, 3D green puzzle piece is the central focus, floating in a light blue background. The background is filled with faint, semi-transparent outlines of other puzzle pieces, creating a sense of depth and connection. The word "Solutions" is written in a clean, white, sans-serif font across the center of the green piece.

# Solutions

# Profiles

# Independent Schools Team



**JOANNA LADA-WALICKI**  
Partner  
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Joanna is a very experienced lawyer. She has particular expertise in advising and guiding independent schools on all areas of employment law as well as parent/school contracts, policies and procedures (including regulatory requirements), child protection and parental complaints. She is a regular speaker at seminars and conferences, runs training programmes and writes articles on a wide range of topics.

Joanna worked for a number of years with Richards Butler (now Reed Smith) in the City and for Charles Russell in Guildford.



**GORDON REID**  
Partner  
01483 464226  
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Gordon joined us in February 1997 and became a partner in 2001. Prior to his move to Guildford he ran his own practice in Hampshire after a 5 year spell with a leading Southampton firm where he had moved since qualifying as a solicitor in 1987. Gordon acts for a wide variety of clients, from private investors to national companies, plcs and charities.



**DAVID LUDLOW**  
Partner  
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David qualified in 1989, having spent his early career in commercial practices in Holborn, the West End, and then 7 years as a solicitor at New Scotland Yard specialising in employment law. David joined the practice in 1997 and became a partner in 1999. He is a seasoned Employment Lawyer and Litigation specialist having conducted a wide range of disputes in Employment Tribunals, the County Court, the High Court, the Employment Appeal Tribunal and the Court of Appeal. A number of these have been reported, most recently in the areas of sex discrimination and shareholder disputes. David is on the Equal Opportunities Commission panel of solicitors and is an active member of the Employment Lawyers Association Management Committee and Training Committee.



**NICK PHILLIPS**  
Partner  
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Nick qualified as a solicitor in 1995 having completed his training at a niche IP firm in London. He joined us in 2003 from a major international law firm based in the City. Nick specialises in intellectual property, information technology and commercial matters. His practice encompasses all aspects of IP, IT and commercial work and includes litigation, advisory and transactional matters. He also acts as a Nominet appointed expert deciding UK domain name disputes.



**ANDREA TISHLER**  
Partner  
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Andrea qualified as a solicitor in October 1998 having completed her training with a Manchester firm. Andrea joined the practice in 1999 and became a partner in 2006. Andrea specialises in law advising clients in all areas of employment law and has conducted a wide range of Employment Tribunal claims. She is also a regular speaker at seminars and runs training initiatives for the practice's clients.



**DAVID FOSTER**  
Partner  
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David is the Partner in charge of litigation in the Guildford office. Qualified in 1988, David handles a range of more complex litigation matters with particular emphasis on professional negligence, insolvency, property and debt recovery litigation handled within his department. David is a trained mediator, nationally known, and has been involved in a number of successfully mediated commercial disputes.



**HELEN HARVIE**  
Consultant  
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Helen is a specialist charity practitioner who has recently joined the firm as a Consultant. She has a commercial background, having worked for a large multinational company before qualifying as a solicitor. She acts as both trustee and advisor to a wide range of charitable trusts, associations and companies, on a national and international basis. She advises on charity registration, restructuring, governance and constitutional issues, trustees duties and responsibilities and all aspects of charity law. Helen is a member of the Charity Law Association and has also advised on major projects for not-for-profit organisations and social enterprises, including Community Interest Companies. She is co-author of "Tolley's Guide to the Charities Act 2006".



**MICHAEL TINLING**  
Consultant  
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Michael trained with a major London City firm. After qualifying he worked in corporate finance and mergers and acquisitions where he gained invaluable experience. He left to join the practice in 1972, moving initially to Guildford and then to Woking. Michael has over 30 years experience in providing legal services to corporate clients and is keen to ensure that he and his team provide practical and timely advice and commercial solutions. Primary areas of work include corporate acquisitions and sales, corporate restructuring, shareholder agreements, unincorporated and limited liability partnerships and share option schemes.

# Independent Schools Team continued.



**BRETT FARRELL**  
Associate  
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Brett joined Barlow Robbins LLP in 2010 and is a specialist technology and media lawyer, he is based at our Woking office. Brett advises on all aspects of technology and media law, although his specialty is the regulated technology sectors such as the capital markets. Joining us from Mitsubishi UFJ Securities International plc where he worked in the capital markets, Brett has accrued a wealth of experience in this sector, with previous appointments at companies including Electronic Arts and BMG Music Publishing.



**SUSANNA FOWLER**  
Solicitor  
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Susanna qualified in 2006 following a career in marketing and public relations. She was a prize winner at Guildford College of Law before joining the firm as a trainee in 2004. On qualification she joined the employment team where she deals with contentious work primarily in the education/charity sector. She also advises on the drafting of contracts of employment and service agreements, compromise agreements and provides support advice to the corporate team.



**MICHELLE TUDOR**  
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Michelle joined Barlow Robbins LLP in October 2007 after completing her training with a south coast firm. She advises on a range of contentious and non-contentious issues for both employers and employees including the drafting and reviewing of contracts of employment and staff handbook policies, directors' service agreements and the negotiating and drafting of compromise agreements. Michelle has been involved with a number of tribunal claims including unfair dismissal, sex discrimination and harassment and age discrimination. She also provides support to the corporate team. She has contributed to employment law seminars and workshops.



**TANUJA SELLAHEWA**  
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Tanuja qualified as a solicitor in 2002 and joined the commercial property team at Barlow Robbins LLP in October 2005. She has experience in commercial property matters and her particular specialisms include commercial leases and licences, surrenders and assignments of leases; commercial freehold acquisitions and disposals; general corporate support on property aspects of share and asset sales and acquisitions for businesses; secured lending for various banks and general non-contentious Landlord and Tenant matters and other aspects of commercial property.



**JONATHAN STEELE**

**Solicitor**

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Jonathan joined the company commercial team at Barlow Robbins LLP after qualifying as a solicitor in 2008. Jonathan understands that clients want pragmatic, timely and cost-effective advice, communicated in a way they can understand and always works to surpass their expectations. Jonathan has experience in all areas of company commercial work with particular expertise in the acquisition and sale of companies, businesses and assets, drafting and advising on commercial agreements, share transactions, company formations and shareholder, partnership and LLP arrangements.



**ELIZABETH ASHFORD**

**Debt Recovery Executive**

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Elizabeth joined Barlow Robbins in April 2005 and has been in the legal profession for 10 years. Elizabeth is a Member of the Institute of Legal Executives and manages the volume debt recovery work. She specialises in dealing with contractual disputes and acts for a wide variety of clients including companies, partnerships, charities and individuals.



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Wendy has been working for Barlow Robbins since January 2010. She is an Associate member of the Institute of Legal Executives and also has a law degree from the University of Hertfordshire. Wendy has two years of experience of debt recovery work and assists a variety of clients.

# Clarity

The image features a vast, clear blue sky as the background. In the lower half, there are several clusters of white, fluffy clouds. The clouds are most prominent in the lower third of the frame, with a few smaller ones scattered above them. The overall scene is bright and open, conveying a sense of clarity and freedom.

## Recent News

## Drugs - guidance for schools

All schools should have a drug policy which covers the content and organisation of drug education, the management of drug incidents, and meeting the needs of pupils. The policy should be developed in consultation with pupils, parents, governors and the wider school community. Revised guidance to schools was to have been issued before September 2010 but this is now delayed.

Public consultation on revised guidance to schools on all matters relating to drug education, the management of drugs within the school community, supporting the needs of pupils with regard to drugs and drug-policy development began on 13 November 2009 and ended on 15 February 2010. The revised guidance was drawn up in response to the recommendations of the Advisory Group on

Drug and Alcohol Education and it defines drugs as including alcohol, tobacco and illegal drugs, as well as medicines and volatile substances.

The revised guidance will have the same status as the current Drugs: Guidance for schools which was published in February 2004. For the time being the 2004 guidance continues to apply.

## Proposed increase in qualifying period for unfair dismissal

The Government has proposed increasing the qualifying period for unfair dismissal from one year to two years.

The timetable for any decision on this has not yet been announced and it is likely that there will be a consultation period first. No Act of Parliament will be required to bring in any change to the qualifying period. It would simply require an Order by the Minister for Employment Relations under the relevant provision of the Employment Rights Act 1996.

There have been previous changes to the qualifying period. It was introduced in 1971 at six months. This increased to one year in 1980 (and two years for small firms with 20 or less employees) and then in 1995 it was fixed at two years for employees in all firms regardless of size. In June 1999 it was reduced back to one year for all firms.

Although this is essentially a positive change for employers, employers do still need to bear in mind that they could still face discrimination and certain unfair dismissal claims. We can expect to hear further from the Government on this soon.



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## Public Benefit Update

The public benefit debate continues apace. Not only did the latest reviews of 'failing' schools reveal a lower than expected minimum figure for means-tested bursaries, but schools now have the prospect of a court case to look forward to in the next few months.

The updated reviews of Highfield Priory School and St Anselm's School were published by the Charity Commission in July. These were the two prep schools that failed the public benefit test in July 2009 because of a lack of means-tested bursaries. Highfield Priory now aim to achieve an annual target of 4.9% of their gross income set aside for bursaries within 5 years. St Anselm's are aiming to be at 2.5% gross income within 2 years, and this has been considered to be satisfactory. It is now clear that bursaries must be at a minimum of 2.5% gross income, that they must be means-tested, that any public benefit activities must be education related and that they only count if the potential beneficiaries are under 18 – adult learning would not count.

### Further Reading...

Keep up to date with the latest News from Barlow Robbins at [www.barlowrobbins.com](http://www.barlowrobbins.com)

The Independent Schools Council was granted permission in early October to apply for a judicial review of the way in which the Charity Commission is interpreting the law in relation to public benefit. The Charity Commission's role is to advise governors on how to comply with public benefit requirements, not to re-write the common law. The Attorney General has now entered the fray. He has made an application to the Charity Tribunal on the same lines and both cases will now be heard together in the Upper Tribunal. It is worth looking at the scenarios put forward by the Attorney General for consideration by the court – they can be found on the Charity Tribunal website. They all revolve around the extent to which public benefit is affected by the charging of fees and the need to make services available to those in poverty. We are advised by Matthew Smith, the barrister acting for ISC, that the results of the case are likely to be available within the next 6 months. In the meantime the existing guidance remains in force.

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## Impact of the Equality Act 2010

The Equality Act 2010 (EA) came into force on 1 October 2010. It consolidates discrimination law set out in various Acts and Regulations into one Act. This includes existing and new provisions relating to disability discrimination. One of the most significant changes introduced by the EA is the ban on the use of pre-employment health questionnaires except in very limited circumstances.

The rationale behind this is that if issues relating to health are known to an employer prior to making an offer of employment this may affect the recruitment decision and an applicant suffering from a disability may therefore be the victim of discrimination. The EA also seeks to encourage those with health conditions to apply for roles which previously they may have been reluctant to do by a request to complete a pre-employment health questionnaire.

The recruitment procedures to be followed by schools are heavily regulated and ascertaining the medical fitness of staff at the application stage was the usual practice. The effect of the EA is that questions about the health and fitness of a candidate should not be asked at the application stage, other than in exceptional cases where the school needs to establish whether the applicant will be able to perform a function that is central to the role itself e.g. if the role of a caretaker involves manual lifting and handling of heavy items it would be reasonable to ask an applicant with a mobility impairment whether he/she

would be able to carry out the role. Questions asked should not go beyond is necessary for the role. At the same time, reasonable adjustments would need to be considered for any disability that is disclosed. If inappropriate questions are asked the Equality and Human Rights Commission may investigate what occurred and this could result in a claim for disability discrimination or an application for an injunction against the employer.

Prior to the interview it is however reasonable to ask an applicant whether he/she requires any reasonable adjustments to the interview process to ensure that the applicant is not disadvantaged at the interview. However, this information should not be considered when deciding who to employ. During an interview questions should not be asked about the applicant's health or absence/sickness record. Any questions of this nature will put the school at risk of a claim for disability discrimination. The interview panel will of course need to include at least one person who is accredited by the National College for School Leadership (NCSL)/Children's Workforce Development Council in Safer Recruitment.

An offer of employment to a teacher will be conditional on the teacher being medically fit to teach. Once the offer has been accepted the school may request the applicant to complete a medical questionnaire or to submit to a medical examination although care needs to be taken to ensure that the questions asked are directly relevant to the role. It is recommended that a completed questionnaire is reviewed by a medical professional. If a condition is revealed that the school believes will cause the applicant difficulties in performing the role or part of the role, reasonable adjustments must be considered. If there are no reasonable adjustments then it will be reasonable



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for the school to withdraw the job offer. However, consideration should be given as to whether there is an alternative role that could be performed by the applicant.

It is recommended that requests for references should also be made after an offer of employment has been made and accepted. The offer will also be subject to satisfactory references. Questions about the applicant's absence levels or suitability for the role should not be asked until a job offer has been accepted.

Schools should review their recruitment policies and procedures and all recruitment documentation to ensure that it does not breach the provisions of the EA. We will be pleased to assist you with this in order to ensure compliance with the provisions of the EA.

#### Further Reading...

Acas has prepared a new and very helpful guidance document setting out the impact of the EA entitled 'The Equality Act – What's new for employers'.

## Preventing Illegal Working

The UK Border Agency published new guidance for employers on preventing illegal working on 2 November 2010. To access the guidance click [here](#).

This guidance will help employers understand the law on illegal working and what they need to do to comply.

The new document is an update of the original guidance published in February 2008 at the start of the illegal working civil penalty regime. It includes details of document checks that employers are advised to undertake, and provides up-to-date images of the documents, stamps and endorsements that may be presented by migrant workers as evidence of their right to work in the UK.

The main changes include:

- confirmation that employers can accept evidence of status in expired passports and travel documents (with the exception of the certificate of entitlement to the right of abode);
- updated images of documents, stamps and endorsements; and
- two new appendices - Appendix B ('Employing asylum seekers and refugees') and Appendix D ('Employing students').

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## Fit and Proper Person Test

The Finance Act 2010 introduced a new definition of charity for tax purposes as a result of a European Court of Justice case which allowed the extension of charity tax reliefs to organisations in the European Union. What is the impact on schools?

As a result, to obtain charitable relief the organisation must be set up for charitable purposes within the EU, (but now extended to the European Economic Area) and regulated by a body such as the Charity Commission.

There is also a requirement that charities must satisfy the 'management condition' where the charity is supervised by 'managers' who are 'fit and proper' persons.

The new condition applies to Gift Aid with effect from 1 April 2010, but is due to be extended to other charity reliefs by the end of 2010. So at the moment there should be little effect on a school unless it trying to register with HMRC for the first time to obtain a gift aid tax refund on donation to a building appeal, for example, but in the future HMRC is likely to take more interest in who is actually running the school.

HMRC issued revised guidance in July 2010, which although giving no statutory definitions of a 'fit and proper person', means that trustees and others with a management function will have to meet the test. HMRC has issued suggested procedures to be followed by a charity, although again there is no statutory requirement to follow such procedures.

The HMRC procedures involve asking 'managers' to read a basic guide and sign a model declaration. Where a school charity uses these procedures on appointing personnel then it can assume they meet the 'management test', unless the school knowingly appoints a manager who is not a 'fit and proper person', who the school, exceptionally, is challenged by HMRC.

For the vast majority of schools, there should not be a particular problem with following the HMRC guidance where they already have a formal process of reviewing senior staff and governors, or inducting new people. For these schools we would suggest that schools include the completion of the model declaration in the review/induction pack for new senior employees and governors.

Problems may arise where schools recruit staff or governors who may have had a past (albeit spent conviction) for some form of fraud, whether in the UK or overseas, but this is likely to be the exception. In this case this would need to be discussed with HMRC if this person is likely to manage or control the school.



## iXBRL

New rules apply to companies filing company accounts, tax returns and computations with HM Revenue and Customs from 1 April 2010 which require them to use an electronic format called iXBRL (inline eXtensible Business Reporting Language) for the accounts. This may affect certain schools.

This format will provide a form of tagging of the data in the accounts which will allow it to be read electronically. Currently accounts produced on Microsoft Word or Excel are not iXBRL compliant and HMRC have indicated that non-compliant returns will be rejected.

Most school charitable companies do not need to complete corporation tax returns every year, but may be required to when HMRC issued a notice file a return, so they should not be affected by this new regime.

However, where a school has a trading company, the trading company will be required to adopt the new format. As the majority of schools and their trading companies use Microsoft Word or Excel to prepare accounts, action needs to be taken to avoid the risk of penalties for failing to comply.

HMRC has created software that is iXBRL compliant, although HMRC has only recently recognised that for 'smaller' charities the format may not be appropriate and therefore until HMRC amends its software, 'smaller' charities will be allowed to file accounts in pdf format.

For these purposes 'smaller' charities mean charities with less than £6.5 million of income, and this limit includes income from trading companies too.

For Alliot's clients, the software we use to produce accounts will have built-in iXBRL tagging in time for the first sets of accounts that must meet the new filing rules (accounting periods ending after 31 March 2010 onwards that are submitted after 31 March 2011).



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